REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: Gerson Gaeseb v The State	**Case No:** HC-MD-CRI-APP-CAL-2023/00033
Coram: Liebenberg J *et* Christiaan AJ	**Division of Court:** High Court, Main Division
Heard: 11 August 2023	**Delivered:** 4 September 2023
Neutral citation: *Gaeseb v S (*HC-MD-CRI-APP-CAL-2023/00033) [2023] NAHCMD 544 (4 September 2023)	
ORDER: 1. The application for condonation is refused. 2. The matter is struck from the roll.	
REASONS FOR ORDERS:	

LIEBENBERG J (CHRISTIAAN AJ CONCURRING):

[1] On 10 May 2022 the appellant, along with two other accused persons, were sentenced to an effective term of 3 years' imprisonment after he was convicted on a charge of robbery with aggravating circumstances. The appeal is against sentence only and based on the following grounds:

a. That the court *a quo* erred in law and or in fact by finding him guilty.

b. That the court erred in law or on the facts for failing to consider that he is a first offender and should be given a lesser sentence from that of his co-accused who have previous convictions.

c. That the court *a quo* erred in law on the basis that the sentence imposed is shocking.

[2] The state raises two points *in limine*, firstly, that the appeal has lapsed and that the grounds advanced by the appellant do not constitute proper grounds of appeal.

[3] The appellant had to file his notice of appeal within 14 days of his sentence as per rule 67(1) of the Magistrates Court Rules. In the present matter, the notice of appeal was filed on 24 October 2022, whereas he was convicted on 29 March 2022 and sentenced on 12 May 2022. His notice of appeal was clearly filed out of time (five months after his sentence).

[4] The appellant has filed a condonation application for the late filing of the notice of appeal. This court has the power to condone a late notice of appeal in terms of s 309(2) of the Criminal Procedure Act 51 of 1977, provided that the applicant has met two requirements namely, that he has proffered an acceptable explanation and the prospects of success on appeal are reasonable. The requirements under s 309 have been re-affirmed by the Supreme Court in applications for condonation.

[5] In *Petrus v Roman Catholic Archdiocese*[1] the Supreme court held as follows:

'In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant's prospects of success on the merits, save in cases of 'flagrant' non-compliance with the rules which demonstrate a "glaring and inexplicable disregard" for the process of the court (*Beukes* at para 20).'

[6] I now turn to deal with both legs for condonation separately. As regards a reasonable explanation, the appellant states that he was shocked by the magistrate's finding and did not understand the procedures of appeal. This explanation, in my view, does not constitute a reasonable explanation for two main reasons. Firstly, the appellant does not explain the nature, severity and duration of the alleged shock so as to enable the court to assess how the alleged shock disabled him from not being able to prosecute his appeal for nearly five months. Furthermore, he does not set out the steps he took to try and note the appeal timeously during the entire period of delay. At best, the explanation amounts to a bare allegation. Secondly, the record reflects that the appellant confirmed to the magistrate that he understood his rights and procedures for appeal after they were explained to him by the magistrate. Therefore, the condonation application is bound to fail on this leg alone.

[7] As regards prospects of success, the court will only consider grounds 2 and 3 in the notice of appeal because ground 1 does not clearly and specifically set out the basis on which it is advanced as required by rule 67. Rather, it is a conclusion drawn by the appellant. Grounds 2 and 3 attack the sentence as being shocking and having no regard to the fact that the appellant is a first offender.

[8] The approach of a court of appeal regarding sentence imposed by the court *a quo* is that sentencing is pre-eminently a matter within the discretion of the court. The grounds on which an appeal court may interfere with a lower court's decision was set out in *S v Tjiho* as follows:

'In terms of the guidelines to which I referred above, the appeal Court is entitled to interfere with a sentence if: (a) misdirected itself on the facts or on the law; (b) if an irregularity,

[1] *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC). See also *S v Arubertus* 2011 (1) NR 157 (SC).

which was material, occurred during the sentencing proceedings; (c) where the trial court failed to take into account material facts or overemphasised the importance of the other facts; (d) if the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by a court of appeal.' [2]

[9] It is in the context of the aforesaid, that the sentence imposed by the learned magistrate must be considered.

[10] In his judgment on sentence, the magistrate was alive to the triad of factors, namely the appellant's personal circumstances, the offence committed, and society's interests[3]. The appellant's personal circumstances were weighed against the aggravating factors as placed before the trial court by the state in arriving at an appropriate sentence. In the judgment, the magistrate found that the crime the appellant was convicted of was aggravated by a number of factors such as the fact that robbery is a crime that tramples on the rights of others. Further to this, the magistrate also found that the crime is serious especially when regard is had to the fact that a weapon (knife) was used to instil fear in the complainant, also, that none of the stolen items were recovered, meaning the appellant benefited from his crime. The appellant was also found to have shown no remorse which, under ordinary circumstances, would have been a mitigating factor, had it been present.

[11] The appellant submits that the sentence is shocking as the trial court had no regard to the fact that he is a first offender with no previous convictions. What is however evident from the trial court's judgment on sentence, is that it did take cognizance of the previous convictions of the other two accused persons, but that not much weight could be accorded thereto as they were unrelated to the charge before court. Counsel for the respondent, on the other hand, argues to the contrary and contends that the magistrate did not misdirect himself when imposing the said sentence of three years' imprisonment on the appellant. I agree. The record reflects that the appellant, together with his co-accused, committed a very serious offence. They attacked the complainant by wielding a

[2] *S v Tjiho* 1991 NR 361 (HC) at 366A-C.
[3] *S v Zinn* 1969 (2) SA 537 (A).

knife to force him into submission and acted with common purpose to steal his money, amounting to N$3400 and meat valued at N$80.

[12] In *Gerevasio v S*,[4] the appellant assaulted the complainant and grabbed the complainant's cellphone valued at N$2000. This court dismissed the appellant's appeal against sentence of 2 years' imprisonment as being appropriate under the circumstances. In the present instance, the robbery by the appellant was committed with a dangerous weapon which posed a serious threat to the complainant's life. The seriousness of the offence of robbery, more especially committed with aggravating circumstances, as in the present instance, cannot be overemphasized. Although appellant is a first offender, it is trite that first offenders are not *per se*, exempted from direct imprisonment.[5] Considering the nature of the crime and the callousness of the appellant's actions, the interests of society may, as in this instance, carry more weight than his interests.[6]

[13] Having come to this conclusion, the appellant's explanation for the delay in lodging his appeal is unreasonable and unacceptable. Further, the grounds of appeal enjoy no prospects of success. The requirements for condonation have thus not been satisfied by the appellant.

[14] In the result, it is ordered:

1. The application for condonation is refused.
2. The matter is struck from the roll.

[4] *Gerevasio v S* (CA 19/2017) [2017] NAHCNLD 97 (28 September 2017).
[5] *Aseb v S* (HC-NLD-CRI-APP-CAL-2022/00024) [2023] NAHCNLD 66 (21 July 2023) para 25.
[6] *S v Katanga* (CC 23/2018) [2019] NAHCMD 66 (27 February 2020).

J C LIEBENBERG **JUDGE**	**P CHRISTIAAN** **ACTING JUDGE**